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United States Supreme Court

OCTOBER TERM, 1964

No. 263

UNITED STATES OF AMERICA,

v.

HOWARD DREW WAGNER,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOSES M. FALK,
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New York, New York

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1965

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Justice of the Supreme Court of the United States:

Peitioner respectfully prays this honorable Court to issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit entered on the 31st day of March, 1965.

OPINION BELOW

The proceedings in the District Court for the Southern District of New York resulted in a jury verdict acquitting the defendant on Counts 1, 2, 3, 4 and finding him guilty on Count 5 of the indictment, Count 6 of said indictment having been discontinued by the government. A copy of said Judgment appears as Appendix A.

The United States Court of Appeals for the Second Circuit affirmed the Court below with no formal opinion.

JURISDICTION

The jurisdiction of this Court is invoked under title 28 United States Code § 1254 (1) and petitioner's cause is founded, in addition, upon rights secured by the Constitution of the United States and specifically the Fourth, Fifth, Sixth and Fourteenth Amendments thereto.

SUMMARY STATEMENT

Appellant. Howard Drew Wagner, appeals from a conviction charging that within the special Maritime and Territorial Jurisdiction of the United States he did commit an act punishable by the laws of the State of New York. to wit. criminally carrying concealed a loaded pistol without a written license therefor in violation of title 18 United States Code §§ 7 and 13.

Trial by Jury was had in the United States District Court for the Southern District of New York.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED ARE:

1. United States Constitution, amendments 4, 5, 6 and 14.

2. United States Code, title 18 § 13.

3. United States Rules of Criminal Procedure—Rule 5 a.

4. Federal Rules of Criminal Procedure 50.

5. New York State Penal Law §1903, as amended by the Laws of 1963, ch. 136 § 8.

6. New York Penal Law § 1897 (2).

United States Code, title 18 § 13, United States Rules of Criminal Procedure 5a; New York State Penal Law §1903, as amended by the Laws of 1963, ch. 136 § 8; New York Penal Law § 1897 (2) are set forth in full in Appendix B annexed hereto.

QUESTIONS PRESENTED:

1. Can the United States Government adopt a Penal Law of the State of New York, which makes it a crime for anyone to carry a loaded pistol without a permit therefor when a citizen from another state carrying a pistol peacefully into New York is prevented from, and denied the right to obtain such a permit without cause or justification? And if the United States Government, adopting such law on a government reservation for its own, prosecutes such citizen, is not said defendant's Constitutional rights to equal protection of the laws and his right to due process of law being violated and discriminated against?

2. A defendant who consistently requests the Court to discharge his counsel as being unprepared and unfamiliar with the facts and as not being the counsel he hired to handle his case, and who actually dismisses said counsel during trial, can said defendant be compelled to proceed when said dismissed counsel is appointed by the Court over counsel's own objection and protest? Does a trial, which proceeds with an attorney who has been discharged and who does not desire to represent the defendant, cause a waiver on defendant's part of flagrant violations to his Constitutional rights as created by said counsel forced upon him by the Court?

3. Has such a defendant a legal right to object when such unwanted counsel advises the Court in the presence of the jury that the defendant refuses to take the stand and the defendant's attorney wishes defendant to place the reasons therefor into the record in open Court?

4. If the subject matter on which the conviction is based, to wit, a revolver, is not identified as the

weapon allegedly possessed by the defendant beyond a reasonable doubt, can said conviction stand?

5. If the apprehending and arresting agents and personnel restrain the defendant and carry on the function of preparing the prosecution of the case to be presented against the defendant rather than taking said defendant before a Magistrate or Commissioner for almost three (3) days as provided by law, is said evidence gathered, permitted to be used during the trial under United States Rules of Criminal Procedure 5a, which states clearly that any person arrested without a warrant shall be brought to the nearest available Commissioner without delay, and not three (3) days later?

6. Is an unauthorized search and seizure, without a warrant and without a crime being attempted, carried out by Sgt. Gallman, on defendant's person illegal, and violating defendant's Constitutional right, and can the proceeds of such illegal search and seizure be used as evidence by the United States Government at time of trial?

STATEMENT OF THE CASE:

This is an appeal by the defendant from a conviction of the fifth count of an indictment and which indictment originally consists of six counts. One count was withdrawn by the government, the defendant being found innocent on the charges in the other four counts.

The defendant was convicted of a count which contained the charge that the defendant, while on the property of the United States Military Academy at West Point, New York, criminally carried concealed a loaded pistol without a written license therefor.

The trial of the said cause was held in the United States District Court for the Southern District of New York, before Honorable Justice Edward C. McClean, and a jury on December 30, 1963; January 2nd, 3rd, and 24th of 1964.

The testimony adduced the fact that the defendant had married the daughter of one Sgt. Gallman stationed at West Point. After a quarrel, defendant's wife went to live with her father and mother. Many pleas were made over the telephone by the defendant for his wife to return, without effect. Subsequently, the defendant learned that his wife had given birth to his child in a hospital without being advised; that Sgt. Gallman, the defendant's wife and the child were to leave the military establishment for an unknown location in the southern part of the United States.

Upon phoning Sgt. Gallman's quarters and requesting the opportunity to talk to his wife for purposes of reconciliation, defendant was advised by Sgt. Gallman, who is an expert pistol shot, that he would be shot on sight. On the 13th day of August 1963, the defendant entered the military quarters of Sgt. Gallman, spoke to his wife and the sergeant without any aggressive act on the part of the defendant who was quiet and restrained; Sgt. Gallman suddenly jumped upon the person of the defendant, allegedly because he saw a bulge in his raincoat pocket. The defendant was thrown to the ground and in the wrestling which followed, a gun went off twice, injuring Sgt. Gallman, the defendant, and the defendant's wife.

The defendant was taken to a hospital under custody and given treatment to his right hand, which was then only a portion of his body injured. Although in the custody of the United States military personnel and the F.B.I., the defendant was first arraigned

three days later, namely, on the 16th day of August 1963.

He was interrogated at length on several occasions while in severe pain, under medication and with no attorney present. The interrogation followed the issuing of a warrant of arrest which was obtained on the 14th, although arraignment was on the 16th. While in custody, property was removed from the person of the defendant without a search warrant.

Defendant did not reside in the State of New York, but rather New Jersey. The charge included the fact that the defendant had failed to obtain a license to carry a gun.

Defendant had engaged counsel to represent him. This attorney, without defendant's knowledge and consent, sent another attorney into Court to try the proceeding. Defendant objected again and again to being represented by this attorney. Finally and during trial, defendant discharged the attorney. The Court presiding then appointed said counsel to continue. Counsel then refused to proceed and requested that he withdraw from the case. The presiding judge refused to permit him to do so. The trial then proceeded with an attorney who did not wish to represent the client, and a client who refused again and again to be represented by said attorney.

Many clear and prejudicial errors were committed by defendant's counsel. Among others, at the end of the government's case, said attorney announced to the judge and jury that the defendant refused to take the stand and testify. That this was against the advice of counsel and he wished to set forth in the record defendant's reasons therefor.

The statements obtained from the defendant while in government custody, before arraignment, but after a warrant was issued, were permitted into evidence. A gun and bullets were permitted into evidence without showing that the said gun and bullets were actually the ones removed from defendant's pocket.

REASONS FOR ISSUANCE OF THE WRIT:

The procedure followed in the long delay in arraignment of the defendant was a violation of Rule 5a of the Rules of Criminal Procedure and of due process.

The defendant, Wagner, was placed under the custody of the military police at about the time of the incident and remained under their constant guard from about 10 p.m. on August 13, 1963, until his "release" and "rearrest" by the F.B.I. which occurred when he was forcibly evicted from the Newburg Hospital at about 11 p.m. on Friday, August 16, 1963.

Mr. Wagner was subject to intensive questioning by the military police authorities who took him into their custody and control on August 13th, about 10 p.m. He was held by these persons and questioned until about 6 a.m. in the morning of August 14, 1963.

The defendant was in pain due to his wound, and said wound remained untreated at West Point, except perhaps for some pain medication which was not effective.

It appeared that after the military police had visited the scene and spoke to the participants and questioned the same, they still proceeded to question the defendant over seven or eight hour periods. When the defendant was finally placed in a hospital, still

under military police guard, on August 14, 1963, these military police then invited the F.B.I. to have access to the defendant, to ask him more questions and try to obtain evidence in this matter.

Mr. Wagner, on the morning of the 14th of August 1963, when admitted to this Newburg Hospital, received heavy doses of antibiotics and more medication for pain and was put into a bed in a semi-private room. Around noon on that day Mr. Larson of the F.B.I. was permitted to enter this room by the military police for the purpose of questioning the defendant once again.

The defendant, although under strong medication, was questioned by Mr. Larson up until the 16th day of August 1963, when he finally was arraigned before a Commissioner at the Southern District Court House.

The cases are quite clear that the above procedure is improper and not to be condoned—especially by those whose interests and powers should be directed in upholding our laws. Mallory v. United States, 354 U.S. 449 held that a violation of Rule 5a of the Federal Rules of Criminal Procedure which requires that an arrested person be taken before a committing magistrate without unnecessary delay; grounds for reversal where incriminating statements elicited from a defendant during a period of unlawful detention.

(On page 453 of this decision the Court States):

> ". . . in order adequately to enforce the Congressional requirements of prompt arraignment, it was deemed necessary to render inadmissible incriminating statements elicited from defendant during a period of unlawful detention."

(On page 454 the Court went on to say):

> ". . . but he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt."

A recent case described on November 26, 1963, at the United States District Court, Eastern District of New York, entitled United States v. Curry, 227 F. Supp. 773, meets the question of undue arraignment and eliciting from the defendant of incriminating statements head on.

The facts of the Curry case are briefly that the defendant was arrested at 4:50 a.m. on February 13, 1962 and taken to the F.B.I. Headquarters in 69th Street, Manhattan. By 10 a.m. said defendant participated in a robbery, and writing and signing of statements occurring between 10 a.m. and 11:18. It was known a Commissioner would be available at 12:30 or 1 p.m. and defendant was taken before Commissioner at 1 p.m. The inculpatory statement of defendant was offered at the trial.

The Court held that these statements were illegally obtained among other reasons, stating Rule 5a was violated. The Court said, "in going beyond the immediate needs of police administration and seeking, in the absence of defense counsel, evidence from the defendant himself for use both to secure an indictment and to prove its allegations;" and third, the interrogation took place during a detention illegally prohibited in violation of Rule 5a and the McNall-Mallory Rule, "once a person is arrested he becomes clothed with the right to have the basis for his arrest inquired into by a magistrate." Kellough v. United

States. 114 U.S. 305. 315 Fed. 241, 247 (App. Div. 1962). The difficulty of finding a commissioner, judge or magistrate is unreal, and, if existed, it would not provide a ground for protracting the interrogation. Mitchell v. United States, 114 U.S. 353, 316 F.2d 354, 356-357 (App. D.C. 1963). The Curry case went on to state:

> " . . . the duty to take the prisoner before a commissioner, judge or magistrate is one that must be performed very promptly in the absence of complicating circumstances that properly require a delay, and in no circumstances is the seeking of a confession as such, a proper ground of delay; C.F. Jackson v. United States (and related cases), 1962, 114 U.S. AD DC. 181, 313 F.2d 572, 575, 576 . . . . Certainly a case in which a complaint has been made and a warrant for apprehension issued requires the conclusion that Rule 5a admits of no delays for the purpose of interrogating the represented defendants, who have not waived the right to counsel, for the general purpose of securing evidence against them."

Also the case of Bolger v. United States, 189 F. Supp. 237, a case decided in the United States District Court for the Southern District of New York, in November 1960, held among other things his detention without arraignment, was not justified where the authorities insist on deviations from this rule.

Your deponent submits Mr. Larson's testimony appearing on the trial was highly improper and prejudicial to this defendant and requires a new trial.

It would appear from the delay in treating the defendant after his initial injury (approximately eight

hours), and the fact that he still required treatment for at least a week after his detention at West Street Detention Pen following his arraignment August 16, 1963, that the apprehending and investigating personnel assigned to this case can take no defense in failing to arraign this defendant, due to his injury and hospitalization, being the same hospital from which they "discharged" him when it suited their pleasure.

The defendant Wagner alleges that when he was in the Newburg Hospital and trying to get counsel, his phone was turned off by the authorities, who still proceeded to question him. This would clearly be a gross infringement upon Mr. Wagner's Constitutional rights.

Likewise the refusal of the trial judge to let Mr. Wagner have the trial counsel of his selection, and whom he hired, was a denial of due process under the Constitution.

People v. Donovan, 13 N.Y.2d 148, 43 N.Y.S.2d 841 involved a case where the defendant signed a confession while unlawfully detained in violation of prompt arraignment, statute and after the police had refused to allow an attorney who had been retained for him by his family to see him. The Court held the admission of the confession into evidence violated Constitutional and statutory provisions respecting the defendant's right to counsel as well as privilege against self-incrimination. Judgment of conviction of first degree murder was reversed and a new trial ordered—although there was adequate evidence to support a verdict of guilty from the confession.

The courts held denial of counsel warranted a

reversal in the case of United States v. Curry, 227 F. Supp. 773. The Court said at paragraph labeled 5-12. "on all the facts it is concluded that Curry's statements of February 13, 1962 were illegally obtained because first he sought counsel, he exigently needed counsel, and the interrogation was nevertheless continued without according him counsel's advice; the 'warning' was given but when its most critical element was wisely invoked—by a statement that the assistance of counsel was desired—it was not implemented. Second, the interrogation exceeded the limits proper to an occasion the limits of which are prescribed by the McNall-Mallory Rule and Rule 5a in going beyond the immediate needs of police administration and seeking, in the absence of defense counsel, evidence from the defendant himself for use both to secure an indictment and to prove its allegations . . . ."

The well known case of Escabedo v. State of Illinois decided in June of 1964 held in the headnote "a conviction, after a trial in which incriminating statements elicited in the interrogation were received in evidence must be reversed. When as here, on investigation by the police is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect who has been taken into police custody, and the police carry out a process of investigation that leads itself to eliciting incriminating statements, and the subject has requested and been denied an opportunity to consult with his lawyer and has not been effectively warned of his absolute Constitutional right to remain silent, the accused has been denied the right to the assistance of counsel, which is obligatory on the states when the Fourteenth Amendment, and no statement elicited from him during his interrogation by the police may be used against him at his trial.

ARGUMENT

POINT I

THE FAILURE OF THE EVIDENCE TO IDENTIFY THE WEAPON AS BELONGING TO THE DEFENDANT BEYOND A REASONABLE DOUBT WARRANTS A SETTING ASIDE OF THIS VERDICT.

It appears from the trial minutes that the weapon was offered in evidence as a gun that resembled the gun or looked like the gun alleged to be possessed by the defendant on August 13, 1963.

It is quite clear there is an important failure of proof at this point as Mr. Gallman only can state it resembles the gun and the rest of the testimony likewise surmises that this gun was the weapon possessed by the defendant. The record fails to disclose any testimony that would connect the military man taking the gun, from Mr. Gallman to its markings by a Mr. Culson—only surmise is present in this identification.

The cases of People v. Razezick, 206 N.Y. 249, 99 N.E. 557; and People v. Kennedy, 32 N.Y, 141, 146 state that an inference cannot be built upon an inference in order to obtain a conviction.

POINT II

THE SEARCH AND SEIZURE ALLEGEDLY CONDUCTED BY MR. GALLMAN ON THE DEFENDANT WAS ILLEGAL.

The indictment number 5 charged the defendant with carrying a concealed weapon.

The proof offered on the trial by the parties allegedly present at the time of the alleged attack on the defendant by the witness Gallman all state no pistol was discernible.

Even Mr. Gallman testified within the framework of the 5th indictment of "concealed weapon" by stating he saw only a bulge and even when the defendant had his hand on the bulge he couldn't tell what it was.

In fact, Mr. Gallman's testimony certainly made anything in the defendant's pocket decisively a concealed thing or item.

The case of People v. Mace, 237 N.Y.S.2d 769, 38 Misc. 2d 533 holds that a search cannot be justified by what it uncovers. The courts also hold there is a presumption against consent or waiver of a defendant's Constitutional rights against unreasonable search and seizure. People v. Cohen, 248 N.Y.S.2d 339, 42 Misc. 2d 403.

Mr. Gallman was a member of the U.S. Army when he allegedly acquired this weapon and then turned said weapon to other members of the U.S. Army.

The case of Feldman v. United States, 64 S. Ct. 1085 at 1084 holds:

> "This Court has refused to draw nice distinctions as to when wrongful acquisitions of evidence by state agencies was also a federal enterprise. When a representative of the United States is a participant in the extortion of evidence or its illegal acquisition, he is charged with exercising the authority of the United States. Evidence so secured may be regained . . . ."

The case of People v. Richter, 40 N.Y.S. 2d 751, 265 A.D. 767, aff'd, 51 N.E. 2d 690, 291 N.Y. 161 holds that more than suspicion is required to justify a seizure of property without warrant and without arrest even though it is subsequently discovered that a crime has in fact been committed.

POINT III

FAILURE TO OBJECT TO EVIDENCE NOT A WAIVER THEREOF WHERE DEFENDANT MADE KNOWN OBJECTION AND DISPLEASURE.

Rule 5d of the Federal Rules of Criminal Procedure states—exceptions to rulings or orders of the Court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the Court is made or sought, makes known to the Court the action which he desires the Court to take or his objection to the action of the Court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, absence of an objection does not thereafter prejudice him.

Here the defendant strongly objected to the Court about his counsel and the conduct of the case throughout the trial.

In United States v. Graham, 325 F.2d 922 the Court held that the cross-examination of the defendants during which inference was made that defendants were drug addicts and had acquired drugs for their own consumption, and argument to jury that nolo contendere plea entered by one defendant in prior prosecution was equivalent to plea of guilty was so prejudicial as to require new trial, notwithstanding defendant's failure to object or request any action

by trial judge. The judgment was vacated and a new trial ordered.

POINT IV

THE DEFENDANT HAD A RIGHT TO A COUNSEL THAT WAS PROPERLY PREPARED TO DEFEND HIM IN AN ADEQUATE MANNER.

The defendant had contracted for counsel to represent him, but on the trial of the case an associate was appointed to try the defendant's case. The defendant objected to the Court, throughout the trial, that he desired the counsel he had hired; and stated that counsel trying the case was not prepared. This fact seems to be borne out by the fact that the defendant's trial was delayed so witnesses could be subpoenaed and interviewed, and the counsel was under the apprehension that possession of a pistol under indictment number 5 was a misdemeanor rather than a felony; that the counsel did not go over the case with the defendant except for a very short meeting and failed to see or obtain the defendant's file from a prior attorney who had resigned from the case due to a coronary attack and hospitalization.

POINT V

SECTION 1903 OF THE NEW YORK STATE PENAL LAW ADOPTED BY THE GOVERNMENT TO PROSECUTE THIS DEFENDANT IS UNCONSTITUTIONAL AS TO THIS DEFENDANT.

This section relates the procedure by which a person must follow in order to properly possess a pistol permit in the State of New York. This section is unlawful under the equal protection laws of the Fourteenth Amendment as to this defendant who was a

non-resident and who could not obtain a pistol permit if he wanted to.

It is submitted that the total section 1903 must be read together to reveal the intent of the New York authorities in granting permits and it is disclosed that a certain contact with New York State must be had—such as a business in New York State or an employee or messenger of a business in New York State, etc. There is no provision for a non-resident, without such contacts, it would appear, to obtain a permit.

Paragraph 3 of this section states very specifically this requirement, as the licensing officer can only be a New York State licensing officer, as this is of course a New York State permit that he is issuing.

The history of the New York State penal law with regard to possession of a pistol reflects that a non-resident per se could not obtain a permit. This appears to be the policy the New York authorities held at the time the defendant was convicted. See 1941 Attorney General Reports of New York State cited in 1941 Atty. Gen. 468 which states a non-resident cannot obtain a permit. Also the following New York State State Department cases reveal this policy: 45 St. Dept. 310; 48 St. Dept. 453; 63 St. Dept. 123.

Thus this defendant was convicted on Federal lands, being a citizen of the United States and being unable to comply with the law that convicted him while other members of another state were eligible to comply with said law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Moses M. Falk
Attorney for Petitioner

APPENDIX A

JUDGMENT

On this 24th day of January, 1964, came the attorney for the government and the defendant appeared in person, and by counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury at the U.S. Military Academy at West Point, N.Y., the defendant, unlawfully, wilfully & knowingly did commit an act punishable by the laws of the State of New York, to wit, of the offense of CRIMINALLY CARRYING CONCEALED A LOADED PISTOL, in that he, then being over the age of sixteen years, had and carried concealed upon his person a loaded pistol, without a written license therefor. (Title 18, U.S. Code, Secs. 7 and 13, New York State Penal Law, Sec. 1897) as charged in count five and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the imposition of sentence on count five is suspended and the defendant is placed on probation for a period of FOUR (4) YEARS, subject to the standing probation order of this Court.

Special conditions of probation:

1. The defendant is not to molest or annoy his wife or her family in any way.

2. The defendant is not to leave this district without the permission of the probation officer.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding. industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

s/ Edward C. McLean
United States District Judge.

s/ James E. Valeche
Clerk.

APPENDIX B

UNITED STATES CODE—TITLE 18, U.S. CODE - 13

Law of States adopted for areas within Federal Jurisdiction -

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in Section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if com-

mitted or omitted within the Jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the Laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment (June 25, 1948 C645 (1), 62 stat 686).

U.S. RULES OF CRIMINAL PROCEDURE - RULE 5A-

Proceeding before the Commissioner -(a) appearance before the Commissioner--an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available Commissioner or before any other nearby officer empowered to commit persons charged with offenses against the Laws of the United States. When a person arrested without a warrant is brought before a Commissioner or other officer, a complaint shall be filed forthwith-

U.S. RULES OF CRIMINAL PROCEDURE - RULE 5B

Exceptions to rulings or orders of the Court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling and order of the Court is made or sought, makes known to the Court the action which he desires the Court to take or his objection to the action of the Court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, absence of an objection does not thereafter prejudice him.

Appendix B

NEW YORK STATE PENAL LAW § 1903, Laws of 1963. ch. 136:

§ 1903. Licenses to carry, possess, repair and dispose of firearms.

1. Eligibility. No license shall be issued or renewed pursuant to this section except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true. No license shall be issued or renewed except for an applicant (a) of good moral character; (b) who has not been convicted anywhere of a felony or any one of the misdemeanors or offenses mentioned in section five hundred fifty-two of the code of criminal procedure; (c) who has stated whether he has ever suffered any mental illness or been confined to any hospital or institution, public or private, for mental illness; and (d) concerning whom no good cause exists for the denial of the license. No person shall engage in the business of gunsmith or dealer in firearms unless licensed pursuant to this section. An applicant to engage in such business shall also be a citizen of the United States, more than twenty-one years of age and maintain a place of business in the city or county where the license is issued. For such business, if the applicant is a firm or partnership, each member thereof shall comply with all of the requirements set forth in this subdivision and if the applicant is a corporation, each officer thereof shall so comply.

2. Types of licenses. A license for gunsmith or dealer in firearms shall be issued to engage in such business. A license for a pistol or revolver shall be issued to (a) have and possess in his dwelling by a householder; (b) have and possess in his place

of business by a merchant or storekeeper; (c) have and carry concealed while so employed by a messenger employed by a banking institution or express company; (d) have and carry concealed while so employed by a regular employee of an institution of the state, or of any county, city, town or village, under control of a commissioner of correction of the city or any warden, superintendent or head keeper of any state prison penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or held as witnesses in criminal cases, provided that application is made therefor by such commissioner, warden, superintendent or head keeper; and (e) have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof.

3. Applications. Applications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper; and, in the case of a license as gunsmith or dealer in firearms, to the licensing officer where such place of business is located. Blank applications shall, except in the city of New York, be approved as to form by the superintendent of state police. An application shall state the full name, date of birth, residence, present occupation of each person or individual signing the same, whether or not he is a citizen of the United States, whether or not he complies with each requirement for eligibility specified in subdivision one of this section and such other facts as may be required to show the good character,

competency and integrity of each person or individual signing the application. An application shall be signed and verified by the applicant. Each individual signing an application shall submit one photograph of himself and a duplicate for each required copy of the application. Such photographs shall have been taken within thirty days prior to filing the application. In the case of a license as gunsmith or dealer in firearms, the photographs submitted shall be two inches square, and the application shall also state the previous occupation of each individual signing the same and the location of the place of such business, or of the bureau, agency, subagency, office or branch office for which the license is sought, specifying the name of the city, town or village, indicating the street and number and otherwise giving such apt description as to point out reasonably the location thereof. In such case, if the applicant is a firm, partnership or corporation, its name, date and place of formation, and principal place of business shall be stated. For such firm or partnership, the application shall be signed and verified by each individual composing or intending to compose the same, and for such corporation, by each officer thereof.

4. Investigation. Before a license is issued or renewed, there shall be an investigation of all statements required in the application by the duly constituted police authorities of the locality where such application is made. For that purpose, the records of the department of mental hygiene concerning previous or present mental illness of the applicant shall be available for inspection by the investigating officer of the police authority. In order to ascertain any previous criminal record, the investigating officer shall take the fingerprints and physical descriptive

data in quadruplicate of each individual by whom the application is signed and verified. Two copies of such fingerprints shall be taken on standard fingerprint cards eight inches square, and one copy may be taken on a card supplied for that purpose by the federal bureau of investigation. When completed, one standard card shall be forwarded to and retained by the division of criminal identification, department of correction, at Albany. A search of the files of such division and written notification of the results of the search to the investigating officer shall be made without unnecessary delay. Thereafter, such division shall notify the licensing officer and the executive department, division of state police, Albany, of any criminal record of the applicant filed therein subsequent to the search of its files. A second standard card, or the one supplied by the federal bureau of investigation, as the case may be, shall be forwarded to that bureau at Washington with a request that the files of the bureau be searched and notification of the results of the search be made to the investigating police authority. Of the remaining two fingerprint cards, one shall be filed with the executive department, division of state police, Albany, within ten days after the issuance of the license, and the other remain on file with the investigating police authority. No such fingerprints may be inspected by any person other than a peace officer, except on order of a judge or justice of a court of record either upon notice to the licensee or without notice, as the judge or justice may deem appropriate. Upon completion of the investigation, the police authority shall report the results to the licensing officer without unnecessary delay.

5. Filing of approved applications. The application for any license, if granted, shall be a public record.

Such application shall be filed by the licensing officer with the clerk of the county of issuance, except that in the city of New York and county of Nassau, the licensing officer shall designate the place of filing in the appropriate division, bureau or unit of the police department thereof. A duplicate copy of such application shall be filed by the licensing officer in the executive department, division of state police, Albany. within ten days after issuance of the license.

6. License: validity. Any license issued pursuant to this section shall be valid notwithstanding the provisions of any local law or ordinance. No license shall be transferable to any other person or premises. A license to carry or possess a pistol or revolver. not otherwise limited as to place or time of possession. shall be effective throughout the state, except that the same shall not be valid within the city of New York unless a special permit granting validity is issued by the police commissioner of that city. A license as gunsmith or dealer in firearms shall not be valid outside the city or county, as the case may be. where issued.

7. License: form. Any license issued pursuant to this section shall, except in the city of New York, be approved as to form by the superintendent of state police. A license to carry or possess a pistol or revolver shall have attached the licensee's photograph, and a coupon which shall be removed and retained by any person disposing of a firearm to the licensee. Such license shall specify the weapon covered by calibre, make, model, manufacturer's name and serial number, or if none, by any other distinguishing number or identification mark, and shall indicate whether issued to carry on the person

or possess on the premises, and if on the premises shall also specify the place where the licensee shall possess the same. If such license is issued to an alien, or to a person not a citizen of and usually a resident in the state, the licensing officer shall state in the license the particular reason for the issuance and the names of the persons certifying to the good character of the applicant. Any license as gunsmith or dealer in firearms shall mention and describe the premises for which it is issued and shall be valid only for such premises.

8. License: exhibition and display. Every licensee while carrying a pistol or revolver shall have on his person a license to carry the same. Every person licensed to possess a pistol or revolver on particular premises shall have the license for the same on such premises. Upon demand, the license shall be exhibited for inspection to any peace officer. A license as gunsmith or dealer in firearms shall be prominently displayed on the licensed premises. Failure of any licensee to so exhibit or display his license, as the case may be, shall be presumptive evidence that he is not duly licensed.

9. License: amendment. Elsewhere than in the city of New York, a person licensed to carry or possess a pistol or revolver may apply at any time to his licensing officer for amendment of his license to include one or more such weapons or to cancel weapons held under license. If granted, a record of the amendment describing the weapons involved shall be filed by the licensing officer in the executive department, division of state police, Albany.

Appendix B

10. License: expiration and renewal. Any license for gunsmith or dealer in firearms and, in the city of New York and the counties of Nassau and Suffolk, any license to carry or possess a pistol or revolver, issued at any time pursuant to this section or prior to the first day of July, nineteen hundred sixty-three and not limited to expire on an earlier date fixed in the license, shall expire on the first day of the second January after the date of issuance. Elsewhere than in the city of New York and the counties of Nassau and Suffolk, any license to carry or possess a pistol or revolver, issued at any time pursuant to this section or prior to the first day of July, nineteen hundred sixty-three and not previously revoked or cancelled, shall be in force and effect until revoked as herein provided. Any application to renew a license that has not previously expired, been revoked or cancelled shall thereby extend the term of the license until disposition of the application by the licensing officer. In the case of a license for gunsmith or dealer in firearms, in counties having a population of less than two hundred thousand inhabitants, photographs and fingerprints shall be submitted on original applications and upon renewal thereafter only at six year intervals.

11. License: revocation. The conviction of a licensee anywhere of a felony or any one of the misdemeanors or offenses mentioned in section five hundred fifty-two of the code of criminal procedure shall operate as a revocation of the license. A license may be revoked and cancelled at any time in the city of New York and county of Nassau by the licensing officer, and elsewhere than in the city of New York by any judge or justice of a court of record.

The official revoking a license shall give written notice thereof without unnecessary delay to the executive department, division of state police, Albany, and shall also notify immediately the duly constituted police authorities of the locality.

12. Records required of gunsmiths and dealers in firearms. Any person licensed as gunsmith or dealer in firearms shall keep a record book approved as to form, except in the city of New York, by the superintendent of state police. In the record book shall be entered at the time of every transaction involving a firearm the date, name, age, occupation any residence of any person from whom a firearm is received or to whom a firearm is delivered, and the calibre, make, model, manufactuer's name and serial number, or if none, any other distinguishing number or identification mark on such firearm. Before delivering a firearm to any person, the licensee shall require him to produce either a license valid under this section to carry or possess the same, or proof of lawful authority as a peace officer or other exempt person pursuant to section nineteen hundred. The licensee shall remove and retain the attached coupon and enter in the record book the date of such license, number, if any, and name of the licensing officer, in the case of the holder of a license to carry or possess, or the shield or other number, if any, assignment and department or unit, in the case of an exempt person. The record book shall be maintained on the premises mentioned and described in the license and shall be open at all reasonable hours for inspection by any peace officer. In the event of cancellation or revocation of the license for gunsmith or dealer in firearms, or discontinuance of business

by a licensee, such record book shall be immediately surrendered to the licensing officer in the city of New York and county of Nassau, and elsewhere in the state to the executive department, division of state police.

13. Expenses. The expense of providing a licensing officer with blank applications, licenses and record books for carrying out the provisions of this section shall be a charge against the county, and in the city of New York against the city.

14. Fees. In the city of New York, the annual license fee shall be twenty-five dollars for gunsmiths and fifty dollars for dealers in firearms. In such city, the city council shall fix the fee to be charged for a license to carry or possess a pistol or revolver and provide for the disposition of such fees. Elsewhere in the state, the licensing officer shall collect and pay into the county treasury the following fees: for each license to carry or possess a pistol or revolver, not less than three dollars nor more than five dollars as may be determined by the board of supervisors of the county; for each amendment thereto, one dollar, and two dollars in the county of Suffolk; and for each license issued to a gunsmith or dealer in firearms, four dollars.

15. Any violation by any person of any provision of the section is a misdemeanor.

NEW YORK STATE PENAL LAW 1897(2)

Any person who has or carries concealed upon his person any firearm which is loaded with ammunition, or who has or carries concealed upon his

person any firearm and, at the same time, has or carries upon his person a quantity of ammunition which may be used to discharge such firearm is guilty of a felony.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 263

HOWARD DREW WAGNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals affirming the conviction is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1965. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including June 16, 1965. The petition for a writ of certiorari was filed on June 16, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether prosecution of petitioner under 18 U.S.C. 13 for carrying a concealed weapon (as defined and prohibited by New York law) at the United States Military Academy in New York was constitutional.

2. Whether petitioner was deprived of his constitutional right to counsel of his own choice.

3. Whether petitioner's conviction should be reversed because his defense counsel requested, in the presence of the jury, that his reasons for refusing to take the stand be reflected in the record.

4. Whether certain evidence was properly admitted at trial.

STATEMENT

Petitioner was tried and convicted by a jury in the United States District Court for the Southern District of New York of carrying a concealed loaded pistol at the United States Military Academy at West Point, New York, in violation of 18 U.S.C. 13 (R. 487-488).[1] The court suspended the imposition of sentence and placed petitioner on probation for a period of four years (R. 501-502). The court of appeals affirmed the conviction from the bench without written opinion.

The uncontested evidence at trial showed that petitioner came to the quarters of his father-in-law, Sgt.

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[1] Petitioner was acquitted on two counts of assault with intent to commit murder and two counts of assault with a deadly weapon (R. 487-488). The government dropped one count of unlawful possession of a pistol (R. 381).

Gallman, at the United States Military Academy, West Point, New York on August 13, 1963. Gallman, observing a bulge in petitioner's trench-coat pocket, concluded that petitioner was carrying a gun. He asked petitioner what he was carrying in his pocket, but petitioner did not answer (R. 243-245). Gallman then engaged in a struggle with petitioner during which a gun in petitioner's pocket was discharged twice. One bullet struck petitioner's estranged wife and one bullet struck petitioner and Gallman in the hands. Gallman took the gun from petitioner and turned it over to the military police upon their arrival at the scene (R. 67-70, 97-103, 189, 244-248, 255-256). Defense counsel conceded in opening and closing argument that petitioner came to the home of Gallman armed with a loaded pistol in his pocket (R. 49, 447, 450-451).

ARGUMENT

1. Petitioner contends (Pet. 16-17) that his conviction under 18 U.S.C. 13 for carrying a concealed weapon in violation of the provisions of New York Penal Law § 1897(2) (1963) is unconstitutional because the State statute discriminates inpermissibly between residents and non-residents of the State. He asserts that the New York licensing provisions (New York Penal Law § 1903 (1963)) make it impossible for him, a non-resident of New York, to obtain a license, and that a federal conviction may not be based on a statute which applies unequally in this manner. This contention is without merit. First, pe-

titioner never made any effort to obtain a license, and he is not, therefore, in a position to challenge the validity of his conviction on the ground that his license was improperly denied.[2] In any event, the licensing statute does not exclude non-residents. Indeed, it provides that a license to carry a concealed weapon "shall be issued to * * * any person when proper cause exists for the issuance thereof" (Pet. App. B, pp. 22-23). It provides expressly (Pet. App. B, p. 27):

> If such license is issued to an alien, or to a person not a citizen of and usually a resident in the state, the licensing officer shall state in the license the particular reason for the issuance and the names of the persons certifying to the good character of the applicant.

2. Petitioner's assertion that he was denied effective assistance of counsel of his choice (Pet. 16) is refuted by the record. Petitioner hired his trial counsel approximately three weeks before trial and, on the day set for trial, retained counsel announced that he was ready for trial (R. 118). After the trial had begun, petitioner complained to the trial judge that his counsel was not familiar enough with the facts of the case to conduct a competent cross-examination (R. 109-123, 332-334). Petitioner said he had no doubt that counsel was competent, but that he did not know

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[2] The statute makes it an offense to carry a concealed loaded pistol. Another provision—New York Penal Law § 1900(3) (1963)—excepts persons holding a valid license. Petitioner obviously violated the criminal statute and has not shown that his violation is attributable to any discriminatory application of § 1900(3).

the facts (R. 114). The court then arranged that petitioner would have time that afternoon to acquaint his counsel with the facts and permitted the defense to recall a government witness for further cross-examination (R. 109-110, 116, 119-120, 122). Defense counsel said he was aware of the facts petitioner had in mind but that they were not relevant to the case (R. 120-121). Petitioner elected to continue the trial with his retained counsel (R. 122). Toward the end of the trial, petitioner again complained of the way counsel was handling the case (R. 354-370) and again stated that he did not question counsel's ability as an attorney (R. 357). Counsel reiterated that he knew the facts petitioner wanted brought out and that they were not relevant (R. 358-359). Petitioner elected to continue with counsel (R. 369).[3] At the conclusion of the prosecution and defense evidence, petitioner asked the court to dismiss counsel (R. 441). In the circumstances, the court properly refused to adjourn the case to let petitioner find another lawyer (R. 427-428, 442). After the jury acquitted petitioner on all counts except possession of a concealed loaded pistol, the court expressed its opinion that defense counsel had done "a very good job." Petitioner agreed and apologized to the court for the way he had acted (R. 495).

3. Petitioner complains that he was prejudiced when his counsel advised the court in the presence of

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[3] Because of petitioner's interference in counsel's conduct of the trial (R. 422-436), counsel asked to be allowed to proceed by way of assignment, which was done (R. 369-370).

the jury that petitioner refused to testify and that counsel wanted petitioner's reasons stated for the record (Pet. 3). The record shows that the court then had the jury removed, and further discussion on this matter was carried on outside the hearing of the jury (R. 437-443). Considering the difficulties defense counsel encountered with petitioner, it was reasonable for him to take the precaution of putting petitioner on record concerning his failure to testify. There is no reason to believe that petitioner was prejudiced because counsel's initial statement was made in the presence of the jury.

Moreover, the court instructed the jury that the defendant does not have to take the witness stand in his own defense and the fact that he has not taken the stand is not to be considered in determining his guilt or innocence (R. 470). Hence, the jury was aware, as its acquittal of petitioner on the four other counts confirms, that it was not to consider petitioner's failure to testify as evidence of guilt.

4. Contrary to petitioner's contention (Pet. 3-4, 13), the gun and bullets taken from petitioner by Gallman were properly and positively identified as the weapons possessed by petitioner on the date of his visit to West Point (R. 313-315, 327). The gun was initialed by the officer who arrived at the Gallman home shortly after the shooting (R. 327).

Petitioner's assertion that the gun was taken from him during an illegal search and seizure by Gallman (Pet. 4, 13-14) is without merit. Gallman was not acting in any governmental capacity. He was, moreover, taking necessary precautions in self-defense

against a threat to his home and family. The weapon was actually removed from petitioner's pocket after two shots had been fired and three persons injured.

Petitioner also complains that testimony regarding an interview between himself and an F.B.I. agent prior to his arraignment was erroneously admitted (Pet. 4, 7-11). The record shows that, upon petitioner's objection, government counsel elected to withdraw the witness rather than interject the *Mallory* question into the case (R. 337-341). A portion of the interview was related by the witness before any objection was made. Apparently defense counsel permitted this limited line of questions in order to open the door for advantageous cross-examination—which made up the bulk of the testimony of the F.B.I. agent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1965.

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United States Supreme Court

OCTOBER TERM, 1965

No. 263

UNITED STATES OF AMERICA,

v.

HOWARD DREW WAGNER,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER IN REPLY

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REPLY BRIEF

POINT I

The government's contention that the licensing statute of the State of New York does include non-residents as such, is incorrect. The argument is correct only as to those non-residents specified in paragraph "3" of Section 1903, of the New York State Penal Law. This completely excludes the defendant, Wagner.

Before a license may be obtained the law makes mandatory the submission of an application. An application may however be submitted only where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper. Defendant fits into none of these categories. It is therefore impossible for a non-resident who has no residence, employment or principal place of business in New York State to submit an application for a license to obtain a pistol or revolver. This law clearly discriminates unconstitutionally against non-residents of the State of New York unless they come within the provisions of paragraph "3."

The government's argument as submitted on page "4" of the Answering Brief is taken out of context. They quoted from paragraph "2(e)" of Section 1903, which deals exclusively with types of licenses. It is obvious that no type of license can be issued if an application therefor cannot be submitted. The language quoted by the government on page "4" of its brief does not eliminate the requirements for an applicant to either reside, be principally employed, or have his principal place of business as a merchant or storekeeper in the State of New York. In quoting

paragraph "7" of Section 1903, on page "4" of its brief, the government once again takes its language out of context. Section "7" simply sets forth what information shall be contained on the license form itself. Paragraph "7" in no way modifies the requirements of paragraph "3."

Although the State of New York may discriminate in favor of its own residents, the United States government in adopting Section 1903, of the New York State Penal Law as its own cannot discriminate against a resident of another state without violating the constitutional rights of such non-resident. At the very least, the statute as applied by the United States Government in prosecuting a resident of another state for a crime allegedly committed on Federal Lands, (West Point) located within the boundaries of New York State, submits an interpretation of the law which is clearly ambiguous and must be deemed unconstitutional. In addition, the Federal Government unconstitutionally discriminates against this defendant by asking to adopt paragraph "2(e)" and "7," and claiming that the same enlarges paragraph "3," when the wording of paragraph "3" is in contradiction, clearly creates an unclear and ambiguous statute which must be deemed unconstitutional. (People v. Pieri) 199 N.E. 495, 269 N.Y. 315.

Obviously, if the defendant could not possibly submit an application to obtain a license for a gun, as a non-resident not within the scope of paragraph "3," any effort on his part so to do would be futile and a nullity, see also (People v. Puerto Rico, et al) 58 Sup. Ct. 167; 302 U.S. 253.

POINT II

The government's contention that the petitioner engaged as trial counsel approximately three weeks before trial, is erroneous. The record clearly shows that the defendant never engaged Mr. Benjamin as trial counsel or otherwise. That it was a Mr. Frankel whom he engaged, and who never appeared in Court, although defendant was under the clear impression that Mr. Frankel was to try his case (R110, 111, 117).

Although Mr. Benjamin, an attorney never engaged by the defendant advised that he was ready for trial, the record clearly shows that the defendant disputed this contention, with justification in that Mr. Benjamin did not know the facts of that case and that the defendant was deceived as to who his trial counselor was to be (R106, 110, 111, 117, 121, 356 and 357).

The government's claim that the defendant stated that Mr. Benjamin was competent, clearly does not express the petitioner's true sentiments. Obviously, the petitioner had never seen Mr. Benjamin try a case in Court. Regardless as to Mr. Benjamin's competency as an attorney, the record shows again and again that the defendant claimed Mr. Benjamin was incompetent to try his case under the circumstances prevailing (114, 121, 356, 357, 364, 368 and 441).

The fact that four counts of the indictment were dismissed (one being dropped), in the case at bar, it certainly is not necessarily to the credit of the defendant's counsel, but rather due to the fact that the government had no case. The testimony of the government's own witnesses clearly showed this as a fact.

The defendant never stated, as the government implies, that his counsel was prepared, knew the facts, and that he was being adequately represented. What the defendant did say (R359) was, "I think you have done remarkably well for what little you have to go on, and how well prepared you were."

This does not excuse the petitioner's attorney who was forced on the defendant by the Court from preparing his case, from securing material witnesses; from even discussing the case adequately with the defendant himself; not understanding whether the charge involved was a misdemeanor or a felony; not knowing whether the person who had obtained statements from your client was a member of the F.B.I. or a police officer; and failing to advise a client that his defense attorney had been changed without petitioner's knowledge and consent (R114, 121, 356, 357, 364, 368, 441 and 359, 355). Under these conditions of unpreparedness and the many circumstances which violated the defendant's constitutional rights at trial, the judgment of the learned Court that it believed the defendant's attorney had done a "good job," may have been justified. But it was not the job which defendant had a right to expect, for which he had engaged counsel and paid a fee.

POINT III

The government's contention that the petitioner was not prejudiced improperly when his counsel, then acting as assigned counsel by the Court (442), stated in the presence of the jury, "If your Honor please, my client has advised me that he does not wish to take witness stand, I would like to have his reasons or whatever he has to say on the record" (448), is simply incredible.

This Court has already held in the case of (Griffin v. California) on April 28, 1965, that such statement made in open Court in the presence of the jury was in fact highly prejudicial, and reversible error.

In the Griffin case, the Court dealt with the question of comment by the prosecutor or the presiding justice. How much more prejudicial is it, when an attorney, appointed by the Court over the defendant's objections, and which attorney allegedly is supposed to protect the defendant's interest, comments before the jury as above indicated, making it obvious to the jury that he disagreed with the defendant's refusal to take the stand. The record is replete with defendant's objection to having this attorney represent him. That this attorney was actually forced on the defendant (442).

The record clearly shows that before Mr. Benjamin advised the jury that his client refused to take the stand, and implied it was against his wishes, the defendant had advised the clerk in chambers as to exactly why he could not take the stand (363), "Even if I take the stand he wouldn't be prepared on leaving the questions to me to bring all these facts out as they took place. This would be another five minute hand by mouth type thing if I took the stand. I don't see any purpose in taking the stand at this time your Honor."

In light of the foregoing statement made by the defendant to the Court, how did this attorney, forced upon this defendant, even dare to tell the jury that he would like to have the defendant state in the record why he would not take the stand. But, incredible as it may seem, this is exactly what had happened.

Clearly, the defendant represented by an attorney the Court forced upon him, could not take the stand because said attorney was unprepared. This was known to the Court and known to the defense counsel. And yet, the Court permitted the jury to retire and deliberate on the question of guilt or innocence, with the full knowledge that the defendant refused to take the stand in opposition to his attorney's advice. This alone is prejudicial error, and cause for a reversal.

POINT IV

The gun and bullets placed into evidence at trial were not identified as the weapons possessed by petitioner on his visit to West Point. Galman testified that he could not identify these items because he did not have his glasses on at the time of the incident (250). He did not remember which M.P. he turned it over to (256). Mr. Cunpson stated he received a weapon and bullets from an Officer Stein (227). But, it was after he received the same from Stein that he marked these items. Stein was never brought in to testify. This created a hiatus and broke the chain continuity of identification. The gun and bullets were improperly introduced into evidence and formed the heart of the conviction against this defendant.

POINT V

Galman's search and seizure of the defendant's clothing was illegal. No warrant had been obtained for such search. Galman further testified that the defendant never made an aggressive act, but only upon his own suspicion, and after defendant failed to answer Galman's question as to what he had in his pocket, did Galman make "a grab" (245). He

further stated, "So far as struggling, he (the defendant) did not even put his hands on me" (93).

POINT VI

The contention by the government that the government counsel elected to withdraw his witness rather than to interject the Mallory question into the case, is completely unfounded. The fact of the matter is before the government sought to withdraw its witness, said witness had already testified to the most damaging issue of the whole case, namely, that "the defendant admitted that 'the gun that was used in the shooting' was his. He told me that he got it in Philadelphia, Pennsylvania, sometime in the summer of 1963. He thought June or possibly July of that year" (357). The damage having already been done and realizing that the Mallory rule clearly indicated a violation of the defendant's constitutional rights, the government withdrew this witness. But the jury had already had the improper testimony. The jury deliberated and found the defendant guilty on this witness' testimony more than any other. The introduction of this improper testimony alone warrants a reversal.

CONCLUSION

The petition for a writ of certiorari should be granted.

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